

# The Concept of “Cultural Affiliation” in NAGPRA: Its Potential and Limits in the Global Protection of Indigenous Cultural Property Rights

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**Abstract:** In the debate about indigenous cultural property, the Native American Graves Protection and Repatriation Act (NAGPRA) of the United States has developed and implemented an unorthodox concept of “cultural affiliation.” The act entitles Indian tribes and Native Hawaiian organizations to claim repatriation of their cultural property—comprising human remains, funerary objects, sacred objects, and objects of cultural patrimony—upon the establishment of a specific shared group identity and a cultural affiliation to an object. The concept of cultural affiliation in the act replaces proof of ownership, or proof that an object was stolen or illicitly removed. It thereby amends traditional standards saturated in notions of property and ownership that have perpetuated since Roman law and allows the evolution of a control regime over cultural property that takes into account the cultural aspects of the objects. On an international level, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007 stipulates a similar emancipation of indigenous peoples’ cultural property claims from notions of property and ownership. This article explores NAGPRA’s cultural affiliation concept as it stands between private property and human rights law and brings into focus the concept’s elements that go beyond traditional property law. It ultimately looks at the potential and limits of the concept from an international perspective as a standard for other countries that consider implementation of UNDRIP’s provisions on indigenous, tangible, movable cultural property.

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## INTRODUCTION

In societies influenced by classical and Justinian Roman law, the legal protection of *proprietas*, *dominium*, or ownership, has developed as the most encompassing right of humanity over *res*—the material things of this earth.<sup>1</sup> Legal protection of property in this way was revolutionary at the time and had not existed previously in old Roman law, which treated *res* as integral to the house dominion of the *paterfamilias* over persons. At that time, the common use of *res* for the family, and not a detached economic perspective, determined the value of things.<sup>2</sup> The development of property under classical and Justinian law into an absolute right uncoupled from the house dominion and factual possession reflected a new economic necessity to regulate an increased exchange of goods and a shift toward a trade-orientated perspective.

In its area of influence, the Roman law principles of private property were established in the following centuries as the leading concepts of property law, even though they were fervently challenged philosophically, sociologically, and legally. The ongoing controversy ranged from John Locke's view that property is central for life and liberty<sup>3</sup> to Pierre Joseph Proudhon, who considered that property is equal to theft.<sup>4</sup>

Today, however, private property stands firmly in Western statutory and common law and celebrates the spreading of its extensive, trade-friendly dimension throughout the world. The antipodal communist theories of the nineteenth century aiming at the limitation of private property have failed in practice. The expansion of private property is also reaching remote areas and developing countries driven by highly influential proponents like the Peruvian economist Hernando de Soto Polar, who evaluated private property not only as the fundamental driving force of the market economy, but also as the most important instrument for development.<sup>5</sup> The philosophical and religious question, "What kind of *res* should be accessible for private property," has dissolved into the question, "What should be excluded from private property." The question is specifically relevant for cultural property.<sup>6</sup> Roman law excluded such objects from private property as *res extra commercium*. How does and should the law treat such property today?

An important feature of cultural property is its cultural function in a community. It triggers aspects of collective use and collective holding. In the form of collective property—sometimes also referred to as common property<sup>7</sup>—it has been advocated as necessary for improving human lives since Plato.<sup>8</sup> Today, however, any collective property is highly monopolized by modern states. With the exception of the Antarctic, all the territory of the world is divided between states.<sup>9</sup> State forming went hand in hand with private property expansion and served as legitimizing instruments for exploiting land resources in the new worlds to an extent that was unknown to the native peoples.<sup>10</sup> At the same time, the collective property held by smaller society sections beyond private company law or the law of associations lost protection and declined.<sup>11</sup> Evolutionists identified collective property as a distinguishing feature between "civilized" and "primitive" peoples,<sup>12</sup> which expanded to the general labeling of collective property as "primitive." Emile de Laveleye even called

it the “Commons” (*Allmend*) in Switzerland, which are still-existing community parcels of land called “primitive property” because of their communal domain.<sup>13</sup> Scholars went so far as to call collective property a deformation of natural law.<sup>14</sup>

It is the constantly growing international indigenous rights movement that brings the relevancy of collective property for smaller, indigenous structures into focus again. Indigenous peoples require respect and support for property of collective structures combined with traditional ways of life and beliefs.

The collective interest of indigenous peoples in their movable, tangible cultural property—including human remains, funerary, sacred and ceremonial objects, objects of cultural importance and cultural patrimony, and artefacts<sup>15</sup>—is the starting point of this article. In 2007, this interest enjoyed important international recognition, when the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples<sup>16</sup> (UNDRIP), which stipulated the protection of indigenous peoples’ cultural property as an essential precondition for their collective well-being. However, nearly two decades before UNDRIP’s adoption, the United States already enacted the Native American Graves Protection and Repatriation Act (NAGPRA) of 16 November 1990.<sup>17</sup> It not only paved the way for UNDRIP’s moveable cultural property provisions, but also allows a look into more than 20 years’ experience with the implementation of such law. NAGPRA leaves the solid ground of private property law by applying a revolutionary new “cultural affiliation” concept that may serve as a valuable example for other countries that are willing, or obliged, to strengthen collective property along cultural lines according to UNDRIP’s provisions on movable, tangible cultural property.

This article will look into the most important property law principles that stand in an old Roman law tradition and still dominate cultural property regulations. The necessity to think beyond such property principles is examined, specifically with regard to indigenous cultural property (in the section on “Cultural Property and the Necessity to Think Beyond Property Law”). With the discussion of a legal theory that goes beyond the principles of property law for indigenous cultural property claims, the article leads to the cultural affiliation concept of NAGPRA (section on “Cultural Affiliation in NAGPRA”). It will then look from an international perspective at the cultural affiliation concept as a standard to implement the relevant UNDRIP provisions in other countries. For this reason, it evaluates the factors that helped the concept to succeed in the United States, and the limits that the United States legislator deemed necessary for the concept to be passed (section on “Cultural Affiliation From an International Perspective”).

## CULTURAL PROPERTY AND THE NECESSITY TO THINK BEYOND PROPERTY LAW

The core of property law is the absolute, legally protected dominion of individuals over things. It represents the historical and deeply rooted basis of property law.

From classical Roman law onwards, such *dominium*, or *proprietas*, has been an a priori unrestricted individual right, indefinite in time and providing absolute power over things.<sup>18</sup> It developed as the legal emancipation from the purely factual possession<sup>19</sup> and was thus a courageous looking beyond the factual control of a thing into the means by which a thing was acquired.<sup>20</sup> Good title replaced possession as the defining element of the relationship between persons and things. Furthermore, the act of acquisition became the central element of property law. Under Roman law acknowledged acts of acquisition were (1) original appropriation, of which *occupatio* was the oldest form, and (2) derivative acquisition or transfer from another person (the *auctor*). The latter required, in addition to the act of acquisition, the previous right of the *auctor*, as *nemo plus iuris ad alium transferre potest quam ipse habet* (nobody can transfer more than he has himself).<sup>21</sup> On the basis of these principles, a claimant could file the *rei vindicatio*, the highly formalized Roman claim of the nonpossessing alleged owner against the possessor. The goal of the claim was to (1) determine ownership of the claimant and (2) to obtain the thing. Defense against such a claim could be successful if the defendant could prove a legitimate act of acquisition with regard to the object, either original or derivative, including proof of good title of any predecessor.<sup>22</sup> If the obtaining of the thing was not possible, Roman law developed as an alternative the possibility of compensating the owner in money.<sup>23</sup> It thereby transformed *res* into financial values.

These Roman law principles have highly influenced modern property laws. The absolute-right character of ownership, the looking into the act of acquisition for defining legitimate property, and monetary compensation for *res* are today firm components of property regimes. However, the burning question is whether these property principles are the appropriate tools for all disputes about all things. Roman law answered this question with a clear “no.” *Res extra commercium* could explicitly not be subject to the *rei vindicatio* claim. The category of *res extra commercium* included divine (especially sacred and religious) communal or public objects,<sup>24</sup> material that we would classify as “cultural property” today.

Today’s civil law regimes try to follow this tradition of the modern cultural property rationale. For example, the *res extra commercium* exemption of cultural objects from property law directly influenced French jurisdiction when the Cour de cassation decided in 1896 that some miniatures stolen from a public municipal library were public property and not subject to the rules of private commerce.<sup>25</sup> Italy explicitly defines a public domain for *res extra commercium* in its Civil Code, which includes culturally valuable objects such as “immovables” of special importance and museum collections.<sup>26</sup> In Switzerland, the Swiss Federal Act on the International Transfer of Cultural Property of 1 June 2005 established the legal foundation for *res extra commercium* cultural property, provided that the items are of specific importance to the cultural heritage and listed in the federal cultural property register (Article 3). At the cantonal level, several laws additionally exclude listed cultural property from private commerce as *res extra commercium*.<sup>27</sup>

Prima facie, such laws free cultural objects from private property principles. At the same time, however, they deliver the objects into a regulatory vacuum, which raises difficult questions. If the vacuum is not otherwise filled, for example, with clerical rules for sacred objects,<sup>28</sup> should the state have free choice to decide upon such public domain? Is the public domain a static area, or should the objects be able to enter the realm of property law through commodification again? Civil law countries resolve the question by bringing cultural property back into a legal property protection regime through *ex lege* ownership clauses on behalf of the state, combined with principles of inalienability and timeless exemption from prescription or bona fides acquisition.<sup>29</sup> The international cultural property law, which was established to better protect the *res extra commercium* status of cultural property, also fails to go beyond property thinking. It requires the establishment of enforcement instruments together with import and export control mechanisms to flank state ownership of cultural property<sup>30</sup> and gives specific treatment to wartime plundered<sup>31</sup> or stolen objects.<sup>32</sup> The focus lies on the absolute property right of states and specific illegitimate acts of acquisition. Discussions turn on the questions of who should have absolute property rights over an object and how the cultural property was acquired. Financial compensation serves as the ultimate “sheet anchor” for protecting private or state property in cultural objects.

Adequate solutions for cultural property disputes and law, specifically with regard to indigenous cultural property, would require thinking beyond the basic principles of property law. The old, codified civil property laws leave little space to do so. The enactment of cultural property provisions or statutes is necessary. In the common law tradition of Anglo-American property law, a smoother development is possible. It allowed cultural property to become the “fourth estate” of property law, forming its own separate category next to real property, intellectual property and personal property.<sup>33</sup> The step has been viewed critically from several directions, including those protecting the marketplace of goods, the cultural commons, or cosmopolitanism on the new category and its regulations.<sup>34</sup> However, the idea of treating cultural property separately proved to be fertile ground for new theories that clearly go beyond property thinking.

Such an interesting theory has been developed by Carpenter, Katyal, and Riley.<sup>35</sup> The different worldviews of indigenous peoples stimulated these three authors to root their concept in a relational vision of cultural property by emphasizing (1) human and social values beyond wealth-maximization purposes,<sup>36</sup> (2) the fluidity and dynamic character of property instead of the mainly stabilizing forces of property law,<sup>37</sup> and (3) the group interest in cultural property other than the one of nation states.<sup>38</sup> The ultimate outcome of the theory is a proposal that stewardship becomes the ruling concept for cultural property, amending property law definitions of ownership.<sup>39</sup> The starting point for the theory is the shift in emphasis from the absolute right over property, to the view of property as a bundle of relative entitlements. To define such entitlements with regard to indigenous cultural property, the authors look at the indigenous peoples’ rights, interests, and obliga-

tions and come to the conclusion that their language for describing the relationship between persons and objects should focus on obligations of custody, care, and trusteeship rather than on rights, entitlements, or dominion over things.<sup>40</sup> In comparing the necessity of stewardship duties with the situation of corporate management and environment protection, the authors suggest that the fiduciary duties of indigenous peoples vis-à-vis their cultural property should be bound up with the web of interests in their cultural property independent of any ownership status.<sup>41</sup>

## CULTURAL AFFILIATION IN NAGPRA

### *The Concept of Cultural Affiliation*

The new property approach along cultural lines of indigenous communities, as set forth in the theory outlined above, has a predecessor in the legal reality of the United States: the Native American Graves Protection and Repatriation Act (NAGPRA) of the United States enacted on 16 November 1990. This law sets up an unorthodox process to allocate old and newly excavated Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. The revolutionary key feature of this process is the application of a “cultural affiliation” prong, which is applied independently of property thinking. It gives the notion of culture a new, directly applicable, and enforceable legal value, and downplays the financial value of the objects.

To establish cultural affiliation, NAGPRA first requires evidence of an ongoing relationship between a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group. The regulations, which further implement NAGPRA, specify this relationship by requiring the following:<sup>42</sup>

1. Existence of an identifiable present-day Indian tribe or Native Hawaiian organization
2. Evidence of the existence of an identifiable earlier group
3. Evidence of shared group identity between the present-day tribe or organization with the identifiable earlier group

Thereafter, the affiliation of the group or specific members of that group and the objects has to be evaluated.<sup>43</sup> For the final allocation of objects within the group, lineal descendants of the deceased, in the case of human remains and funerary objects, and the original holders of objects, in the case of cultural items, take precedence over tribes and organizations.<sup>44</sup> Ultimately, cultural affiliation decides which person or group of persons shall be the owner, possessor, or steward of an object, resulting in repatriation if necessary.



The cultural affiliation prong abandons the language of property and works with a language that emphasizes personal relations and interrelations with regard to an object. It takes into account that the colonial private property regime was superimposed on Native American cultural property,<sup>45</sup> of which the possession and use was formerly tied in with complex social and spiritual linkages between peoples and their surrounding world "through ties that did not have an abstract existence but were activated within social gatherings and rituals."<sup>46</sup> The idea that cultural property may be accessible for private property reconceptualized Native Americans' relationships to cultural practices within changing social and spiritual bonds. Through the cultural affiliation component, NAGPRA allows a redevelopment of Native American traditional relations and ties, and loosens the tight private property language and thinking.

NAGPRA takes the prevalence of cultural interrelations over property principles even further, as it amends Western legal criteria of procedural proof for cultural affiliation. It additionally acknowledges "oral tradition," or "hearsay" as evidence for cultural affiliation, alongside geographical, kinship, biological, archaeological, anthropological, linguistic, folklore, and historical information or expert opinion.<sup>47</sup> It also refrains from requiring actual "proof" or "scientific certainty" of cultural affiliation, but only looks for a preponderance of evidence.<sup>48</sup> This again goes in line with indigenous views, like their customs and rules, *inter alia* with regard to property and cultural objects, mainly based upon oral traditions passed down from generation to generation.

For Western private property minds, the resolving of "ownership" questions based on hearsay stories about cultural relationship is a challenge. This may be illustrated by a NAGPRA case regarding three painted Native American shields.

The Pectol Shields, named after their finder's family name, were in the possession of the Capital Reef National Park in south-central Utah, when NAGPRA required the park to reallocate and possibly repatriate the shields to the Native Americans. Several archaeological expert opinions, consultations with Native American tribes, and the radiocarbon dating of the shields, left the cultural affiliation of the shields unresolved. They were unique in the anthropological records, and too little was known about the various Native American groups in the area during the period of the shields' manufacture around 300–400 years previously.<sup>49</sup> The Navajo singer or medicine man John Holiday finally provided the necessary "evidence," by telling the most convincing hearsay story. He related that a Navajo man called Many Goats White Hair had created the shields nine generations previously as sacred ceremonial objects. In the 1860s, when the U.S. Army rounded up about half of the Navajo tribe and drove them to Fort Sumner in New Mexico, two other Navajo men, Man Called Rope and Little Bitter Water Person, were concerned about the shields' safety. They hid them in an area which the Navajos call the Mountain With No Name and Mountain With White Face. This story was the reason why the shields were ultimately repatriated to the Navajo Nation. John Holiday's story was convincing because he could identify Man Called Rope as his grandfather,



FIGURE 1. Mr. Pectol and daughters Golda and Devona hold the three Buffalo shields. Photo courtesy of the E.P. and Dorothy Hickman Pectol Family Organization.

and because Navajos and anthropologists alike considered John Holiday as a highly respected man of impeccable integrity.<sup>50</sup>

This story is far from the notion of Western ownership proof and to some extent “painfully unclear” as an applied rule of evidence. One may also question, whether the story lead to a legally correct or rather politically motivated decision.<sup>51</sup> Nevertheless, the experience with NAGPRA shows that native oral histories and traditions have become highly important and carry a lot of weight in the decisions of scientists, museums, and agencies about the treatment and transfer of Native American cultural property. They became invaluable as a source for testable hypotheses even relating to prehistoric times. Steven J. Gunn counted at least 308 cases, in which oral histories and oral traditions played a role in determining cultural affiliation.<sup>52</sup> It is thus an important instrument for making NAGPRA and its cultural affiliation work.

In practice, the *cultural affiliation* concept is not the easiest, fastest, or most unambiguous concept to deal with.<sup>53</sup> Yet, since NAGPRA’s enactment in 1990, the concept has encountered few disputes assessed by the NAGPRA Review Committee<sup>54</sup> and only two major limitations. Both limitations concern specifically the allocation of human remains. The first one is the question of whether and how the cultural affiliation prong applies in defining an object as “Native American” in the sense of NAGPRA. In the most significant litigation under NAGPRA about a 9000-



year-old skeleton, called the Kennewick man, district and appellate courts designated the limits of the cultural affiliation concept. Briefly, they held that the Kennewick man's bones had “no special and significant genetic or cultural relationship to [a] presently existing indigenous tribe, people, or culture” and were thus not subject to the protection of NAGPRA.<sup>55</sup> In addition, they held that oral traditions could not bridge the period between the time when the Kennewick man lived and the present day.<sup>56</sup> However, the courts left it for practice to define from what time period very old objects qualify as Native American.<sup>57</sup> The second big issue on cultural affiliation was resolved by an amendment to the NAGPRA Regulations, adopted in March 2010. Federal agencies and museums did not know how to proceed with human remains and associated funerary objects previously determined to be Native American, but for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization could be identified. The amendment to the regulations on culturally unidentifiable human remains now determines that it shall be left to the Native American tribes to identify the culturally affiliated tribe where the human remains shall be possibly repatriated.<sup>58</sup> Scholars expect that the regulations will lead to a tectonic shift in the balance of power between museums and indigenous groups, and that museums are likely to challenge the regulations in court as exceeding the scope of allowable administrative action under NAGPRA.<sup>59</sup>

In the United States, both limitations of the cultural affiliation concept have been widely discussed. Instead of analyzing the national discussions once more, this article will take the concept of cultural affiliation forward and bring it into a broader legal and international context for evaluating the basic factors that ought to be considered if the concept of cultural affiliation is to serve as a national standard in other countries.

### *NAGPRA and Property Law*

When looking at NAGPRA's cultural affiliation concept, one must be aware that it forms part of a property act that is principally rooted in property thinking. To gain a broader picture of how the cultural affiliation concept is embedded in the act, one has to recall that the act regulates two major issues. It first resolves the question of how federal agencies and museums should treat Native American cultural property kept in their collections. NAGPRA answers this question by obliging federal agencies and museums to inventory Native American human remains, summarize cultural items and thereafter—if possible, requested, and not legally prevented—repatriate them to culturally affiliated Native Americans or Native Hawaiian organizations.<sup>60</sup> The second central section in NAGPRA regulates the allocation of Native American archaeological items newly excavated or discovered on federal or tribal lands after NAGPRA's enactment (16 November 1990). NAGPRA makes clear that ownership or control of such items should be allocated to the Native Americans or Native Hawaiian organizations.<sup>61</sup>

The first section on repatriation is based on a general assumption on behalf of the Native Americans. At the very beginning stands the assumption that transactions with Native American cultural property were generally deficient and that culturally affiliated persons or groups remained the rightful owners of Native American objects, despite any transfer and until proven otherwise. This is one of the consequences that NAGPRA took from the insight that in the past a significant amount of Native American cultural property “was acquired through illegitimate means.”<sup>62</sup> It reflects a study on Native American cultural property mandated by the American Indian Religious Freedom Act of 1978,<sup>63</sup> which concluded regarding Native American cultural property: “Most sacred objects were stolen from their original owners. In other cases, religious property was converted and sold by Native people who did not have ownership or title to the sacred object.”<sup>64</sup>

In order to rebalance this assumption, NAGPRA contains a possibility for a party that is not willing to repatriate an object, to prove a “right of possession” of the object.<sup>65</sup> This leans toward ownership, but is not. NAGPRA defines the right of possession as “the possession obtained with the voluntary consent of an individual or group that had authority of alienation.”<sup>66</sup> NAGPRA considers the act of acquisition and thus one of the basic property law principles in order to allocate an object. However, the view of this act of acquisition is an exceptional one, as it first asks about the alienability of an object in the application of Native American customs before it looks at the transaction itself. It thereby allows the Native Americans to qualify an object as *res extra commercium* before the acquisition of good title by transfer may be considered.

Another element in NAGPRA’s repatriation section seems to turn a conflict about Native American property into a more or less conventional property dispute. It is the possibility that Native Americans may file a repatriation claim for their sacred objects and objects of cultural patrimony based upon previous “ownership” or “control.”<sup>67</sup> This option forms an alternative to the repatriation claim based upon cultural affiliation.<sup>68</sup> It emphasizes the property character of the objects by asking for *ownership*. However, it again weakens such claim on absolute property rights by allowing evidence of previous control over an object instead. The use of the nontechnical term *control* opens an unexplored avenue of interpretation and seems to add factual possession as an alternative to ownership.<sup>69</sup> Even this property claim in NAGPRA is thus a differentiated property claim if compared to a regular ownership claim.

The NAGPRA section on newly excavated and discovered archaeological items uses property law terms when defining “the *ownership* or *control*” (emphasis added) of such items.<sup>70</sup> Similar to states’ ownership of cultural property found on state territory, NAGPRA stipulates that the Native Americans shall be the “owners” or “controllers” of objects found on federal or tribal lands. However, NAGPRA goes on to fill the ownership term with a list that defines the persons and tribes who shall receive the objects. It starts with the lineal descendants as the prioritized owners of human remains and associated funerary objects,<sup>71</sup> followed by the tribal landowners for receiving unassociated funerary objects, sacred objects, and ob-

jects of cultural patrimony.<sup>72</sup> The last ones in the priority list are the culturally affiliated tribes, or tribes with aboriginal land occupation, or with any other strong cultural relationship.<sup>73</sup> The property relevance of this ownership system is unique and difficult to assess within the cultural property system. Despite its property context, it deviates, as a new allocation system, from basic private property finders’ law principles.

As can be seen from these provisions, NAGPRA mixes the cultural affiliation concept with traditional property law terms and considerations, thereby embedding the statute to some extent back into a familiar legal system. This helps the new concept to find acceptance and to work in practice, as the property law terms may serve as checks and balances for resolving disputed cases. However, NAGPRA does in no way treat cultural items as financial values and lacks any obligation to compensate for repatriations or findings through excavation. It thereby abolishes good faith acquisition mechanisms and finders’ fees.

### *NAGPRA and Human Rights Law*

Even though NAGPRA stands in a property law context, the act is generally qualified as human rights legislation.<sup>74</sup> Important driving forces behind its enactment was the national and international claim for respect of indigenous peoples’ right of self-determination and the insight that Native Americans need to be included in terms of humanity.<sup>75</sup> For decades Native American human remains were excavated, collected, and researched for scientific reasons. Not least of all they served to prove Native American’s racial inferiority as “savages.” Such activities were often tolerated, supported, or even ordered by the government.<sup>76</sup> The existing federal and state law did not come close to protecting Native American graves in the same way as Western graves.<sup>77</sup> The revealing of the highly discriminatory incidents regarding Native American human remains together with a mounting Native American skepticism against scientific research on the remains emerged into a nationwide Indian burial rights movement.<sup>78</sup> Around the same time, the federal government in the United States started serious efforts to redirect the Smithsonian Institution’s vast holdings of Native American and Hawaiian material. Museum collections of Native American objects were no longer seen as “representations of reality,” but rather as “hostages” to imperialist values.<sup>79</sup> The outcome was the National Museum of the American Indian Act of 1989,<sup>80</sup> which inter alia contained detailed repatriation provisions and the establishment of the National Museum of the American Indian in Washington, DC, that opened its doors in 2004.<sup>81</sup> The national activities coincided with a new international spirit of cooperation on the protection of cultural heritage. As a consequence, the United States agreed with Latin American states on the protection and repatriation of pre-Columbian heritage and ratified in 1982 the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970. All of these factors paved the way for NAGPRA’s enactment in 1990.<sup>82</sup>

Under legal terms, the treatment of Native American human remains was newly considered an infringement of the rights of nondiscrimination.<sup>83</sup> Under the U.S. Constitution, the Equal Protection clauses of the Fifth and Fourteenth Amendments, and the First Amendment protecting Free Exercise of Religion served as a basis to back such human rights infringement claims.<sup>84</sup> With regard to human remains, NAGPRA was thus designed to address the flagrant violations of the “civil rights of America’s first citizens.”<sup>85</sup> The rationale behind the claim for protection and repatriation of sacred objects and cultural patrimony was rooted in violated civil rights or human rights connected with land taking, resettlements, reservation building, genocide, as well as encompassing assimilation programs prohibiting ceremonies.<sup>86</sup>

Nevertheless, NAGPRA’s codification of human rights in such an extensive cultural property act is a phenomenon which is singular worldwide.<sup>87</sup> It relied on a broad national consensus to resolve the Native Americans’ claims for respect, proper treatment, and repatriation of their cultural property by statutory law. Not only Native American tribes and organizations but also numerous major associations of museums, scientists, and historical societies supported the legislation.<sup>88</sup> NAGPRA was a compromise that was passed in the Senate by voice vote and by unanimous consent in the House of Representatives.<sup>89</sup> Morris A. Fred describes the compromise as follows:<sup>90</sup>

For the Native Americans, NAGPRA presented an opportunity to redress the wrongs of past centuries perpetrated by the dominant culture and to regain control over the past so as to build a future. For the museums, the challenge to their past practices in building collections also implicated their future, for it would not only affect their research and exhibitions (i.e., which objects were to remain in their collections) but also their methods for continuing to collect data to develop further their scientific fields.

NAGPRA is also an exceptional human rights law in that it goes far beyond the usually limited scope of action of human rights standards. It is a federal act that explicitly accomplishes human rights with positive, concrete duties imposed upon federal agencies and museums. In addition, it provides for important tools to support the enforcement of the required activities. They include (1) the obligation of federal agencies and museums to initiate repatriation processes by inventorying and summarizing their collections in consultation with tribal governments, Native Hawaiian organizations’ officials, and traditional religious leaders;<sup>91</sup> (2) the obligation of federal agencies and museums to publish notices of completed inventories<sup>92</sup> and notices of intent to repatriate;<sup>93</sup> (3) specific procedural structures to support the processes such as the NAGPRA Review Committee formed by a balanced number of native and nonnative members;<sup>94</sup> (4) penalties against museums in case of noncompliance;<sup>95</sup> and (5) financial grants to the amounts of about USD 2 million per year<sup>96</sup> for museums and tribes in order to enable them to carry out NAGPRA activities.<sup>97</sup>

Finally, NAGPRA is a special human rights law as it explicitly integrated Native American laws and customs through direct consultations. It requires cooperation with Native American tribes and Native Hawaiian organizations to determine cultural affiliation, the right of possession, and the definition of whether an object is sacred or cultural patrimony in the sense of NAGPRA.<sup>98</sup> This integrative process of Native Americans in decision making in a human rights framework is a central value of the act. Thereby, NAGPRA does not make the mistake of simply referring to Native American customary law which is—like Western law—basically unsuitable for bridging indigenous and Western worldviews.<sup>99</sup> It, rather, goes in line with the proposal of Christoph B. Graber who has evaluated procedural solutions as the most promising for dealing with indigenous peoples that are claiming control over their cultural heritage.<sup>100</sup> Participatory processes correspond much better with the traditional individual rights system of Native American communities. Rather than through abstract substantive rights, such as private property rights, Native American individual rights unfold through procedural rights.<sup>101</sup> As political power was located with families, local villages, or bands,<sup>102</sup> respect for individual autonomy in these structures was deployed through everyone’s right to speak and be part of collective decision making.<sup>103</sup>

### *Assessment*

NAGPRA provides an amendment to U.S. cultural property law reflecting human rights and indigenous perspectives. It has confronted social and historical wrongs and legally acknowledged ongoing lives, cultures, and beliefs of precolonial, indigenous groups, which are separate from and incompatible with Western large-scale structures and majority interests. Thereby, the concept of cultural affiliation is more than simply an evidentiary term in determining ownership in Native American cultural property. It is more than a means to restore possession or control of objects that Native American tribes and Native Hawaiian groups have arguably never relinquished, or lost into what property law calls full ownership. It is a concept that, on the one hand, ultimately triggers indigenous peoples to reestablish shared identity and new cultural values in a changed political, economic, and cultural environment. On the other hand, it requires Western institutions to learn about and possibly reshape cultural history by respecting indigenous values. With extended repatriation obligations of Western institutions, NAGPRA stipulates a limited shift of the power of decision onto Native American tribes. Yet, despite the expected detrimental effects of such a shift, NAGPRA’s repatriation process, which has lasted for more than 20 years, shows the contrary. Repatriations did not lead to the emptying of collections, and Native American participation in the process has had a highly stimulating effect on all parties involved.

The United States Government Accountability Office Report to Congressional Requesters of July 2010 (GAO Report) inspected the NAGPRA work performed by eight key federal agencies with substantial collections of Native American cultural prop-

erty.<sup>104</sup> The number of historical objects of these eight agencies ranged from 5.7 million to 122.5 million, or 589,796 cubic feet (10,701 m<sup>3</sup>) each.<sup>105</sup> To date, however, a mere 209,626 objects have been identified as culturally affiliated NAGPRA human remains and associated funerary objects. Indeed, a little less than three-quarters of them (141,027) have been repatriated.<sup>106</sup> These numbers are substantial, but still small in comparison with the millions of historical objects stored in the collections of the eight GAO Report agencies alone. A large undisclosed number of Native American objects remain in the collections, and there is no indication that the size of the collections would not be able to cope with NAGPRA repatriations.<sup>107</sup>

The reason for the limited repatriation activities under NAGPRA is the reluctance of Native American tribes to require the return of their objects. For example, the Navajo Nation, the receiver of the Pectol Shields, does not generally require repatriation of human remains. They foster the predominant belief that contact with the dead may sicken or kill the contaminated person.<sup>108</sup> The Hopi amended their encompassing repatriation policy after having evaluated chemicals on the returned objects as posing a health risk for their people. Such chemical products were applied for the better preservation of the objects.<sup>109</sup>

More typical, however, is the experience of Wendy Teeter and Hidonee Spoonhunter, the curator and assistant curator of Archaeology of the UCLA Fowler Museum in Los Angeles. The Sealaska Corporation came to investigate the Fowler Museum's collection. This native corporation, owned by over 20,000 tribal member shareholders from the Tlingit, Haida, and Tsimshian people,<sup>110</sup> looked at 4000 objects of the museum with possible cultural affiliation. They came out with only a few objects in which they were really interested and only one that they were looking to pursue for repatriation. It was a Chilkat blanket, which they wanted for ceremonial use.<sup>111</sup> Wendy Teeter and Hidonee Spoonhunter never experienced unreasonable or unethical requests. It is thus not only spiritual beliefs, lack of cultural reburial protocols, lack of burial sites, or lack of financial resources that hinder a more extensive NAGPRA process.<sup>112</sup> It is also a moderate reservation of the tribes and organizations vis-à-vis repatriation or the lack of interest. This has been the case over the last 20 years of NAGPRA, and it is not expected that this tendency is going to drastically change in the future, at least on the domestic level.

Museums and agencies generally benefit from the NAGPRA process even more than Native Americans. During the cultural affiliation process, the involved tribes contribute masses of information and knowledge about the objects, their use, cultural protocols, and history, thereby substantially enhancing their value.<sup>113</sup> Many long-stored cultural objects, thought to be worthless, gain new meaning in the exchange between continuing cultures. The repatriation of human remains allows reburials that at the same time serve to reestablish a better relationship with Native American tribes. The NAGPRA process uncovers poor curating practices, along with poor historical records and documentation<sup>114</sup> and challenges archaeologist curators, museums, and agency personnel to the benefit of the collections. At the same time, it puts responsibility on the Native Americans who are trying to re-



connect the loose ends of their traditional lives through the evaluation of objects and establish family bonds through the burial of lost relatives.<sup>115</sup> NAGPRA induces tribes to redevelop lost cultural protocols and ceremonies for the reburial of human remains.<sup>116</sup> They have to remember or reestablish cultural practices and ceremonies, as only sacred objects “for the practice of traditional Native American religions by their present day adherents” and cultural patrimony with “ongoing historical, traditional, or cultural importance” may be repatriated.<sup>117</sup> Bands also have to re-form as distinct groups with their own separate identity, as only recognized tribes may claim repatriations.<sup>118</sup> They have to negotiate with other tribes to sort out competing repatriation requests, as NAGPRA states that in such cases federal agencies and museums may keep the item until the requesting parties reach agreement, or the dispute is otherwise resolved.<sup>119</sup> And last but not least, NAGPRA encourages the development of tribal museums and cultural centers, the number of which has already surpassed 150 in the United States.<sup>120</sup>

In short, NAGPRA fostered new partnerships and cooperation between scientists and Native Americans and “redefined the scope of a museum’s fiduciary duties without draining collections.”<sup>121</sup> The NAGPRA process challenges the involved parties, but at the same time stimulates a new booming interest in American or Native American cultural diversity. Allegedly, the upgrading of the Native American cultures even has a macroeconomic benefit. It would be worth evaluating NAGPRA’s impact on cultural self-esteem, involvement in majority activities, knowledge, health,<sup>122</sup> and the development of economic independence of tribes and Native American families.<sup>123</sup> In comparison, the financial investments for the NAGPRA process are minimal. Federal agencies spend only a fraction of their budgets on NAGPRA activities.<sup>124</sup> Grants awarded to tribes and museums for repatriation projects, on average, do not exceed USD 40,000–60,000 each (total around USD 2 million/year).<sup>125</sup>

This brings us back to the stewardship theory of Carpenter et al. summarized above in section 2. NAGPRA is a working example of the stewardship theory that proves that the implementation of stewardship duties into legal property structures is possible and helps to balance worldviews and notions of property. The language used in NAGPRA notices of intent, for example, shows how such indigenous notions of stewardship may be integrated into cultural property law principles. Federal agencies and museums have to publish such notices of intent in the *Federal Register* before they actually repatriate culturally affiliated items.<sup>126</sup> On the one hand, the notices clearly define, in Western terminology, the “owners” of the objects.<sup>127</sup> On the other hand, the notices use stewardship terminology by stating for example that a certain cultural item was consecrated to a person “to care for and use the items,” or to a person as the appropriate “custodian” of an item. Despite such different wording, the intention is clear and defined by NAGPRA. In its ultimate meaning, the stewardship theory does not support an absolute right to repatriation, which would push its object into the trap of absolute rights already inherent in the concept of ownership and property. It does not support

repatriation activities that prevent an object fulfilling its cultural purpose or worsens the relation between the interest groups. Stewardship rather requires that the culturally affiliated group of people, ready and able to fulfill and ensure stewardship duties, should be allowed to define the use and destiny of a cultural object according to applicable or, if necessary, redeveloped cultural protocols.

Michael F. Brown has nevertheless heavily criticized the stewardship theory mainly for not considering the shrinking public domain and its protection from privatization, for being unrealistic, too vaguely defined, and unable to prevent commodification.<sup>128</sup> However, why should we not add the bundles of stewardship rights and duties of indigenous peoples to their cultural property, if this helps to bridge language differences, comply with human rights, and even enhance the value of indigenous objects and lives for the benefit of everyone? Why should we reinforce the illusion of the public domain, which stands at the discretion of the economically and militarily powerful if needed, above the valid interests of the culturally affiliated? Why should cultural affiliation not be one of the determining factors, and stewardship a guiding principle, in property law and jurisprudence if a participation mechanism costs less than the micro- and macroeconomic gain?

## CULTURAL AFFILIATION FROM AN INTERNATIONAL PERSPECTIVE

### *Cultural Affiliation as a Standard for Implementing UNDRIP*

At the international level, the issue of indigenous cultural property finds important regulations in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the United Nations General Assembly on 13 September 2007. As well as the 143 countries originally voting for the Declaration, the United States, Canada, Australia, and New Zealand—originally voting against it—officially declared endorsement of it by the end of 2010.<sup>129</sup> UNDRIP emerged from the human rights bodies of the United Nations, mainly the former UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the Working Group on Indigenous Populations, in a process lasting more than two decades.<sup>130</sup> The UNDRIP is in principle not legally binding. Yet UNDRIP had a massive impact on academic and human rights activists' fields as well as public awareness. Important academic opinion also assessed customary international law in UNDRIP. Even if generally contested, the International Law Association (ILA)<sup>131</sup> Committee on the Rights of Indigenous Peoples, for example, took the position that the UNDRIP provisions referring to the right to cultural identity as well as the right to adequate reparation and redress for suffered wrongs are internationally binding customary law.<sup>132</sup> In any case, however, for UNDRIP to become truly effective, an implementation process at regional, national, and international level would have to follow.

In the field of indigenous cultural property—specifically cultural tangible and movable objects—UNDRIP gives distinct indications of the measures to be taken. It contains a clear statement that indigenous human remains have to be repatriated (Article 12). Furthermore, it requires access and/or repatriation of ceremonial objects (Article 12.2) and restitution of artefacts (Article 11.2), if they were taken without the indigenous peoples’ free, prior, and informed consent or in violation of the relevant indigenous peoples’ laws, traditions, and customs. These provisions go beyond private property concepts, as principally they neither require prior ownership nor any kind of title in the objects for indigenous peoples to access or claim for restitution of “their” objects. The reference to “their”—meaning the indigenous peoples’ cultural property—leaves open what allocation concept shall apply. Just because the text refers to “their” property, this does not mean that it talks about private ownership. Especially in the context of indigenous peoples, the chances are high that a right to use or a right to custody prevails over a right of ownership.<sup>133</sup> In addition, the provisions do not help in assessing the particular beneficiaries, or the laws, traditions, and customs to be applied.

That is where NAGPRA’s cultural affiliation concept could step in and make UNDRIP’s cultural property provisions practicable and enforceable in any other state. It would allow appropriate solutions along cultural lines with the avoidance of narrow property thinking. However, when looking at NAGPRA and its cultural affiliation concept, one must also acknowledge the factors that helped the act to succeed and the clear lines and limits that the United States legislators drew in order for the act to be passed.

### *Factors to Be Considered When Implementing Cultural Affiliation*

The cultural affiliation concept in NAGPRA helped to initiate and carry out a certain redistribution process of Native American cultural property in the United States. This is politically challenging, as redistribution processes may cause legal insecurity or—especially in case of land redistributions—even political destabilization.<sup>134</sup> In the case of NAGPRA, however, the act forms part of federal statutory law enjoying federal enforcement leverage existing under the rule of law. As such, it left no space for legal insecurity to arise. Furthermore, NAGPRA’s redistribution process is limited to old and newly excavated tangible, movable Native American cultural property. With regard to sacred Native American objects, NAGPRA narrows the subject matter even further by requesting present-day ceremonial use.<sup>135</sup> The same is true for cultural patrimony, which must be of ongoing, central importance to Native American tribes in order to fall under NAGPRA.<sup>136</sup> The redistribution process is thus far from having a politically destabilizing effect. Nevertheless, many defining and limiting factors and circumstances were necessary for NAGPRA to be passed and to succeed. They equally

need to be considered when looking at the cultural affiliation concept as an implementation standard for the UNDRIP provisions.

A first important factor that needs to be considered is that in the United States a special legal and political relationship between the federal government and the Native American tribes could be established. This relationship is rooted in a Supreme Court decision of 1831, in which Chief Justice Marshall described the relationship between the federal government and the Native American tribes as that of a “ward to his guardian” with the Native Americans as “domestic dependent nations.”<sup>137</sup> This statement developed into a trust doctrine and later into a system of federal Indian law (of which NAGPRA forms part). Furthermore, the special relationship between the federal government and Native Americans also stands in a tradition of preferential treatment and affirmative action on behalf of Native Americans and Native American tribes<sup>138</sup> even against possible equal rights concerns.<sup>139</sup> The special relationship thus legitimized the federal government to treat Native American repatriation claims in particular and to advocate redistribution of Native American property on their behalf. In every other country where indigenous peoples do not enjoy a similar position within the state’s structure, the enforcement of a legal redistribution of cultural property might cause more political difficulties.

Furthermore, in view of the historic conflict between state governments and indigenous peoples, a legal federal act such as NAGPRA may not be appropriate to implement human rights standards. Indigenous peoples might principally object to the subjugation of their affairs under state law and to definitions that form part of Western tradition.<sup>140</sup> NAGPRA exemplifies, however, that state law, if drafted carefully, is able to successfully bridge underlying conflicts.<sup>141</sup>

When looking at NAGPRA for ways to implement UNDRIP’s cultural property standards, one must also not forget that NAGPRA did not have to resolve *ab initio* the usually very difficult question of who should be the beneficiaries of the redistribution. The act could rely on previous common and statutory federal law that contain definitions and recognition procedures for Native Americans and Native American tribes.<sup>142</sup> It furthermore profited from a well-developed integration of Native American tribal realities into United States law as the result of a long-ranging social, political, and legal process. Thereby, NAGPRA and especially its cultural affiliation concept benefit substantially from the large amount of work invested in refurbishing U.S. colonial history. The important cultural knowledge and common understanding gained from that process substantially helps the NAGPRA process to work in practice. And last but not least, of great importance for NAGPRA’s success is the fact that the government runs and financially supports the process. NAGPRA is thus structurally and politically well embedded, and works due to the availability of the necessary know-how and resources. All these factors need to be adequately taken into account when looking at NAGPRA and its cultural affiliation as an example for the implementation of UNDRIP’s cultural property provisions in other countries.

## *Limitations to Be Considered When Implementing Cultural Affiliation*

### The Exclusion of Private Parties

Probably the most important limitation in NAGPRA that helped the act to be passed is its narrow definition of the affected addressees. Only U.S. federal agencies and federally funded museums have to follow NAGPRA's repatriation obligations.<sup>143</sup> In this sense NAGPRA explicitly states that the "Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government."<sup>144</sup>

NAGPRA thus remains without obvious effect on private entities (other than the Native American beneficiaries) that do not receive federal funds. Thereby, it circumvents the most difficult problem of any redistribution process, which is the possible infringement of the right to private property. In the United States, this right to private property is enacted in the Fifth Amendment of the Constitution.<sup>145</sup> Worldwide, this right is the most frequently codified constitutional right<sup>146</sup> and an important international human rights standard. The Universal Declaration of Human Rights<sup>147</sup> explicitly guarantees the right to individual property in Article 17. Also, the three regional human rights standards protect the right to private property: the American Convention on Human Rights<sup>148</sup> in Article 21, the African Charter on Human Rights and Peoples' Rights<sup>149</sup> in Article 14, and the European Convention on Human Rights<sup>150</sup> in Article 1 of Protocol 1.<sup>151</sup>

NAGPRA nevertheless has two sections that directly affect the individual property of third parties. This is the case in the section about NAGPRA items newly excavated or discovered on federal or tribal lands after 16 November 1990.<sup>152</sup> For such objects, NAGPRA—by law—imposes "native ownership"<sup>153</sup> upon the Native Americans.<sup>154</sup> As a consequence, it entitles the so-defined Native American owners to civil property claims against any individual finder or future possessor of such objects, irrespective of private property finder's law. NAGPRA itself and the cultural affiliation prong are decisive.<sup>155</sup>

The other NAGPRA section that goes beyond the federal and Native American relationship is 18 U.S.C. § 1170. This section penalizes illegal trafficking in Native American objects. It includes the knowing sale, purchase, use for profit, or transportation for sale or profit of human remains<sup>156</sup> and cultural items.<sup>157</sup> With regard to human remains, the clause is not limited to any particular age of human remains, or to objects previously interred in federal or tribal lands.<sup>158</sup> Thus, anybody claiming or paying money for any Native American human remains within or outside the United States territory runs the risk of committing a NAGPRA crime. The effect is that human remains of Native Americans effectively have become *res extra commercium*. With regard to cultural items, trafficking is penalized if they were obtained in violation of NAGPRA's ownership or permit provisions<sup>159</sup> or in violation of NAGPRA's repatriation provisions (by removing an object from the

repatriation process for example).<sup>160</sup> In both instances, a criminal conviction can be avoided if the offender proves a right of possession to the object that is, however, subject to the voluntary consent of the Native American individual or group with authority to alienate the object.<sup>161</sup> This application of NAGPRA on private persons has been challenged in court. However, in *U.S. v Kramer*,<sup>162</sup> the Court of Appeals for the Tenth Circuit confirmed the applicability to individuals as follows:<sup>163</sup>

It is true that Congress enacted NAGPRA to protect Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony, and to repatriate such objects currently held or controlled by federal agencies and museums... However, "to give teeth to this statutory mission," section 4 of NAGPRA amended Title 18 of the United States Code to criminalize trafficking in Native American human remains and cultural items, in an effort to eliminate the profit incentive perceived to be a motivating force behind the plundering of such items. . . . It is clear that the criminal provision, 18 U.S.C. § 1170(b), to which defendant pleaded guilty, encompasses violations by individual traders such as Kramer.

Apart from such specific effects of NAGPRA on Native American cultural property in possession of private persons, NAGPRA leaves most cases with regard to Native American cultural property outside the possession of federal agencies and museums unresolved. UNDRIP's provisions, however, principally require more encompassing solutions.

## The Exclusion of International Claims

NAGPRA also limits its field of application to domestic issues. It does not consider international claims of Native Americans for their cultural property. As stated above, NAGPRA explicitly provides that it should not be construed to establish a precedent with respect to foreign governments.<sup>164</sup> Thus, the act avoids extraterritorial effect and any conflict with Native American cultural property state possessions outside the United States. This is in line with the international principle that states respect each other's territoriality and the property rights attached thereto. The Draft Declaration on Rights and Duties of States of 1949<sup>165</sup> formulated such territorial property rights by ensuring the right of every state to "exercise jurisdiction over its territory and over all persons and things therein" (Article 2). This is deployed in the genuine universal juridical freedom of states to use and exploit their territories whenever they consider it desirable for their progress and economic development.<sup>166</sup>

However, NAGPRA could have at least empowered and obliged the federal government to work at the international level toward solutions for Native American repatriation claims. One may even raise the question as to whether the fiduciary duty of the federal government vis-à-vis the Native American tribes, which emanates from their special relationship, would not require such activity from the federal government even without an explicit legal provision.



## CONCLUSION

Private property law as originally developed in Roman law may not provide adequate solutions for indigenous peoples’ cultural property claims. The latest international regulations, most importantly UNDRIP, require going beyond property thinking to better respect the interests of indigenous peoples to control or access their cultural property.

NAGPRA is a pioneer in implementing such requests for tangible, movable Native American cultural property, in the relationship between the United States federal government and Native American tribes. It innovated the concept of cultural affiliation, which turned out to be a successful instrument, stimulating a vibrant exchange between scientists, museums and tribes, adding value to many collections and objects. NAGPRA’s cultural affiliation concept is a working example from which cultural property lawyers can learn that the property law principle of looking into the act of acquisition is not the only just solution for allocating cultural property. The cultural affiliation prong bridges different property concepts that are based on very different worldviews and it better complies with human rights standards than Western private property law principles. It serves as an example for countries that are ready to implement UNDRIP’s provisions on tangible, movable cultural property of indigenous peoples. However, when implementing NAGPRA’s cultural affiliation concept, one not only has to consider the political and legal factors that helped NAGPRA to be passed and to succeed, it is also important to acknowledge the limits to the cultural affiliation concept in NAGPRA, even if they do not comply with the provisions of UNDRIP.

## ENDNOTES

1. Kaser and Knütel, *Römisches Privatrecht*, 119; and Noyes, *The Institution of Property*, 131–220.
2. Kaser and Knütel, *Römisches Privatrecht*, 119.
3. Locke, “Second Treatise of Government,” 195–196, 219.
4. “*Propriété, c’est le vol*”: Proudhon, “Qu’est-ce que la propriété?” 198.
5. De Soto, “Push Property Rights;” De Soto, “Why Capitalism Works in the West but Not Elsewhere;” See also Acemoglu and Johnson, “Unbundling Institutions.”
6. This article uses the term *cultural property* to emphasize the focus on moveable, tangible forms of cultural heritage. On the problem of using the term *property* in the context of indigenous cultural heritage, see, for example, Prott, “The International Movement of Cultural Objects,” 226.
7. See, for example, van Banning, *Human Right to Property*. This article uses the term *collective property* referring to the preambular text and Article 1 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). On the difference between collective property and “open access”; see Eggertsson, “Open Access Versus Common Property,” 74–76. Eggertsson shows that Hardin’s famous article “The Tragedy of the Commons,” which fiercely questioned “common property,” referred to open access rather than collective property.
8. Waldron, “Property and Ownership.”
9. Wolfrum, *Die Internationalisierung staatsfreier Räume*, 4. Regarding Antarctic territory, see Kazcorowska, *Public International Law*, 115–117.
10. Humphrey and Verdery, “Introduction: Raising Questions about Property,” 4.

11. Humphrey and Verdery, "Introduction: Raising Questions about Property," 18.
12. Humphrey and Verdery, "Introduction: Raising Questions about Property," 4, citing Lewis Henry Morgan.
13. De Laveleye, *Primitive Property*.
14. Humphrey and Verdery, "Introduction: Raising Questions about Property," 4.
15. This categorization stems from UNDRIP Articles 11 and 12 and 20 U.S.C. § 3001(3) of the Native American Graves Protection and Repatriation Act (NAGPRA).
16. UNDRIP, GA Res. 61/295 (UN Doc. A/61/L.67 and Add.1) (adopted on 13 September 2007).
17. NAGPRA, 25 U.S.C. §§ 3001–3013, 18 U.S.C. § 1170.
18. Kaser and Knütel, *Römisches Privatrecht*, 119, 124; and Noyes, *The Institution of Property*, 78–79.
19. Kaser and Knütel, *Römisches Privatrecht*, 120.
20. Blackstone, "Commentaries on the Laws of England," 393.
21. Kaser and Knütel, *Römisches Privatrecht*, 129.
22. Kaser and Knütel, *Römisches Privatrecht*, 144–145.
23. Kaser and Knütel, *Römisches Privatrecht*, 145.
24. Kaser and Knütel, *Römisches Privatrecht*, 104–105.
25. Cour de cassation 17 June 1896 (Jean Bonnin c. Villes de Mâcon et de Lyon), cited by Siehr, "International Art Trade and the Law," 64.
26. Italian Civil Code, Article 822(2); see Siehr, "International Art Trade and the Law," 65.
27. For an overview on such cantonal law, see Weber, *Unveräußerliches Kulturgut*, 20–23.
28. Regarding clerical rules of *res sacra*, see Weidner, *Kulturgüter als res extra commercium*, 21–24; and Weber, *Unveräußerliches Kulturgut*, 198–214.
29. Weidner, *Kulturgüter als res extra commercium*, 95–96.
30. On such instruments, see Siehr, "International Art Trade and the Law," 132–146 and 162–232; most important is the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 823 UNTS 231 (adopted on 14 November 1970, entered into force 24 April 1972).
31. See, for example, The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (adopted on 14 May 1954, entered into force 7 August 1956); and The Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict of 1954, specifically Article I(3) of the Protocol.
32. On an international level the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 34 ILM 1322 (adopted on 24 June 1995, entered into force 1 July 1998) concentrates on "stolen" objects in one of two main sections. In the United States, courts have started to qualify cultural property that has been transferred in violation of legal ownership clauses on behalf of foreign states as being "stolen" according to the National Stolen Property Act on illicitly exported archaeological cultural property. *United States v Hollinshead* (1974) 495 F 2d 1154 (9th Cir); *United States v McClain* (1977) 545 F 2d 988 (5th Cir), (1979) 593 F 2d 658 (5th Cir); *United States v Pre-Columbian Artifacts and the Republic of Guatemala* (1993) 845 F Supp 544 (ND Ill); *United States v Schultz* (2002) 178 F Supp 2d 445 (SDNY), (2003) 333 F 3d 393 (2d Cir), (2004) 157 L Ed 2d 891 (cert. denied). See generally Siehr, "International Art Trade and the Law," 56–107.
33. Carpenter, Katyal and Riley, "In Defense of Property," 1032.
34. Carpenter, Katyal and Riley, "In Defense of Property," 1039–1046, referring to the opinions of Eric A. Posner, Michael F. Brown, Naomi Mezey and Kwame Anthony Appiah.
35. Carpenter, Katyal and Riley, "In Defense of Property."
36. The authors argue that the ultimate aim of legal protections should be to further Margaret J. Radin's concept of "human flourishing" by linking property and personhood as an alternative or complement to wealth-maximization rhetoric. Carpenter, Katyal and Riley, "In Defense of Property," 1046–1047, referring to Radin, *Reinterpreting Property*; Radin, *Contested Commodities*; and several of her articles.
37. With regard to indigenous peoples' cultural property the authors make a distinction between property which may be used for development and trade (dynamic stewardship), and property that

needs to be kept away from the market in order to ensure proper use of cultural objects (static stewardship); Carpenter, Katyal and Riley, “In Defense of Property,” 1083–1087.

38. Carpenter, Katyal and Riley, “In Defense of Property,” 1027–1028.

39. Carpenter, Katyal and Riley, “In Defense of Property,” 1028, 1050–1065. “It is for the continuance of the tribe, its norms, values, and way of life, that Indian people bring their claims for ongoing access to sacred sites or other cultural resources—and not solely for their personal fulfilment.” Carpenter, Katyal and Riley, “In Defense of Property,” 1051.

40. Carpenter, Katyal, and Riley, “In Defense of Property,” 1065–1067. The primary goal in indigenous worldviews is the avoidance of disturbing spirits in animate things, rather than making maximum possible use of them for their material benefit; See also Champagne, “Indigenous Self-government, Cultural Heritage.”

41. Carpenter, Katyal and Riley, “In Defense of Property,” 1074.

42. 43 C.F.R. § 10.14(c).

43. NAGPRA, 25 U.S.C. § 3001(2); 43 C.F.R. § 10.2(d)(1), 10.2(e) and 10.14.

44. NAGPRA, 25 U.S.C. § 3002(a)(1) and (2); and 25 U.S.C. § 3005(a)(1) and (2).

45. Carpenter, Katyal and Riley, “In Defense of Property,” 1048.

46. Humphrey and Verdery, “Introduction: Raising Questions about Property,” 17.

47. 43 C.F.R. § 10.14(e).

48. 43 C.F.R. § 10.14(f). See also Gunn, “The Native American Graves Protection and Repatriation Act,” 528, referring to United States Senate, *Providing for the Protection of Native American Graves*, 10.

49. Threedy, “Claiming the Shields,” 100–101.

50. Threedy, “Claiming the Shields,” 110.

51. Nafziger, “Protection and Repatriation of Indigenous Cultural Heritage,” 73; Email from Neal Busk, Head of the E.P. and Dorothy Hickman Pectol Family Organization. “Pectol Shields,” (6 March 2012), on file with the author.

52. Gunn, “The Native American Graves Protection and Repatriation Act,” 528.

53. From the view of biological anthropologists, for example, NAGPRA’s cultural affiliation concept compromises their role in determining cultural affiliation and ignores the complex cultural, biological and historical processes associated with the development or construction of cultural identity. Schillaci and Bustard, “Controversy and Conflict.” On the concept’s application and difficulties in practice see the National Association of Tribal Historic Preservation Officers, *Federal Agency Implementation of NAGPRA*, 18, 41. On weaknesses of the United States’ statutory effort to protect and repatriate indigenous heritage in general see Nafziger, “Protection and Repatriation of Indigenous Cultural Heritage,” 73–75.

54. Schillaci and Bustard counted five Review Committee findings on cultural affiliation disputes published in the *Federal Register* until 2010. Schillaci and Bustard, “Controversy and Conflict,” 357.

55. *Bonnichsen v United States* (2004) 367 F 3d (9th Cir), 879. See, for the decision of the District Court of Oregon (2002), 217 F Supp 2d 1116, 1152–55 (D Or).

56. *Bonnichsen v United States* (2004), 881–882, 879.

57. For a summary of the courts’ holdings and a critical discussion of the case, see Nafziger, “Protection and Repatriation of Indigenous Cultural Heritage,” 62–70; and Harding, “Bonnichsen v. United States.”

58. 43 C.F.R. § 10.11.

59. Goldberg, “A United States Perspective.” For a positive assessment of the 2010 NAGPRA Regulations, see Niesel, “Better Late Than Never?”

60. NAGPRA, 25 U.S.C. § 3005.

61. NAGPRA, 25 U.S.C. § 3002.

62. Trope and Echo-Hawk, “The Native American Graves Protection and Repatriation Act,” 44.

63. 42 U.S.C. § 1996.

64. Trope and Echo-Hawk, “The Native American Graves Protection and Repatriation Act,” 44, citing the Secretary of the Interior Federal Agencies Task Force, *American Indian Religious Freedom Act Report*.

65. NAGPRA, 25 U.S.C. § 3005(c).

66. NAGPRA, 25 U.S.C. § 3001(13).
67. NAGPRA, 25 U.S.C. § 3005(a)(5).
68. Trope, "Chapter 1," 12.
69. See also 2 NAGPRA, 5 U.S.C. § 3002(a), by which NAGPRA attributes "ownership or control" of Native American cultural items that are excavated or discovered on Federal or tribal lands after 16 November 1990 to the Native Americans.
70. NAGPRA, 25 U.S.C. § 3002(a).
71. NAGPRA, 25 U.S.C. § 3002(a)(1).
72. NAGPRA, 25 U.S.C. § 3002(a)(1)(A).
73. NAGPRA, 25 U.S.C. § 3002(a)(1)(B) and (C). McKeown and Hutt, "In the Smaller Scope of Conscience," 187–188.
74. Nafziger, "Protection and Repatriation of Indigenous Cultural Heritage," 47.
75. Nafziger and Dobkins, "The Native American Graves Protection and Repatriation Act in Its First Decade," 38.
76. See for example Nafziger and Dobkins, "The Native American Graves Protection and Repatriation Act in Its First Decade," 38–43; Gunn, "The Native American Graves Protection and Repatriation Act," 508–511.
77. Trope, "Chapter 1," 45–47.
78. Nafziger, "Protection and Repatriation of Indigenous Cultural Heritage," 42–44.
79. Nafziger, "Protection and Repatriation of Indigenous Cultural Heritage," 43.
80. 20 U.S.C. § 80q.
81. 20 U.S.C. § 80a–1(a).
82. Nafziger, "Protection and Repatriation of Indigenous Cultural Heritage," 42–45. Nafziger and Dobkins, "The Native American Graves Protection and Repatriation Act in Its First Decade," 79–81.
83. For international protection, see the UN International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 (adopted on 21 December 1965, entered into force 4 January 1969); and UN, International Covenant on Civil and Political Rights, 999 UNTS 171 and 1057 UNTS 407; 6 ILM 368 (adopted on 16 December 1966, entered into force 23 March 1976), Articles 2 (1) and 26.
84. Trope and Echo-Hawk, "The Native American Graves Protection and Repatriation Act," 46–50.
85. Trope and Echo-Hawk, "The Native American Graves Protection and Repatriation Act," 59, citing Senator Daniel Inouye.
86. Prohibition of Discrimination, see the UN International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 (adopted on 21 December 1965, entered into force 4 January 1969); Prohibition of Genocide, see UN Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (adopted on 9 December 1948, entered into force 12 January 1951); Right of Thought, Conscience, and Religion and Minority Protection, see Articles 18 and 27 of the International Covenant on Civil and Political Rights, UN, International Covenant on Civil and Political Rights, 999 UNTS 171 and 1057 UNTS 407; 6 ILM 368 (adopted on 16 December 1966, entered into force 23 March 1976). For the discussion of these rights in the realm of indigenous peoples' repatriation requests, see Lenzerini, "The Trail of Broken Dreams."
87. No other country has responded, to date, to indigenous peoples' human rights claims for control over their old cultural property in a similarly encompassing legal, statutory act. Activities have accrued in other states, like Canada, with a variety of programs and policy initiatives, yet they lack legal effect and are based upon ethical considerations or potential obligations. Bell, "Ownership and Trade."
88. McKeown and Hutt, "In the Smaller Scope of Conscience," 187–188. Among the supporters were the American Association of Museums, Society for American Archaeology, Society of Professional Archaeologists, Archaeological Institute of America, American Anthropological Association, American Association of Physical Anthropologists, National Conference of State Historic Preservation Officers, National Trust for Historic Preservation, Preservation Action, Association on American Indian Affairs, Native American Rights Fund, and National Congress of American Indians.
89. McKeown and Hutt, "In the Smaller Scope of Conscience," 153.

90. Fred, “Law and Identity,” 203.
91. NAGPRA, 25 U.S.C. § 3003 and 3004.
92. NAGPRA, 25 U.S.C. § 3003(d).
93. 43 C.F.R. § 10.8(f).
94. NAGPRA, 25 U.S.C. § 3006.
95. NAGPRA, 25 U.S.C. § 3007.
96. U.S. GAO, *Report to Congressional Requesters*, 14.
97. NAGPRA, 25 U.S.C. § 3008. No funding is granted for repatriations from Federal agencies, and no enforcement mechanism exists to ensure Federal agencies’ compliance except through litigation by private parties. U.S. GAO, *Report to Congressional Requesters*, 51, 53.
98. NAGPRA, 25 U.S.C. § 3001 (4C and 4D).
99. Graber, “Institutionalization of Creativity,” 250–251.
100. Graber, “Institutionalization of Creativity,” 251–252.
101. Goldberg, “Individual Rights and Tribal Revitalization,” 913.
102. Champagne, *Notes from the Center of Turtle Island*, 7.
103. Goldberg, “Individual Rights and Tribal Revitalization,” 912.
104. Interior’s Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), Bureau of Reclamation (BOR), U.S. Fish and Wildlife Service (FWS), National Park Service (NPS), U.S. Department of Agriculture’s Forest Service, the U.S. Army Corps of Engineers (Corps), and the Tennessee Valley Authority (TVA). U.S. GAO, *Report to Congressional Requesters*, 51, 53.
105. U.S. GAO, *Report to Congressional Requesters*, 7.
106. U.S. GAO, *Report to Congressional Requesters*, 45.
107. The activities vary from agency to agency. Some have already published thousands of notices of inventory completion and several notices of intent to repatriate cultural items. Others, such as the TVA, have not yet established cultural affiliations for any of their NAGPRA items. U.S. GAO, *Report to Congressional Requesters*, 21, 46, 53.
108. Holiday and McPherson, *A Navajo Legacy*, 235–239.
109. Loma’Omvaia, “NAGPRA Artefact Repatriation.”
110. See [http://www.sealaska.com/page/about\\_us.html](http://www.sealaska.com/page/about_us.html).
111. Teeter and Spoonhunter. Interview with author, 16 March 2011.
112. Teeter and Spoonhunter. Interview.
113. Teeter and Spoonhunter. Interview.
114. U.S. GAO, *Report to Congressional Requesters*, 17, 29.
115. Teeter and Spoonhunter. Interview.
116. U.S. GAO, *Report to Congressional Requesters*, 49.
117. NAGPRA, 25 U.S.C. § 3001(3)(C and D).
118. NAGPRA, 25 U.S.C. § 3001(7).
119. NAGPRA, 25 U.S.C. § 3005(e). U.S. GAO, *Report to Congressional Requesters*, 49. In the Pectol Shields case, not only the Navajo Nation, but also Ute and Paiute tribes and the Southern Ute tribes presented cultural affiliation evidence. Threedy, “Claiming the Shields,” 115.
120. Gunn, “The Native American Graves Protection and Repatriation Act,” 522.
121. Nafziger, “Protection and Repatriation of Indigenous Cultural Heritage,” 71.
122. On the Native American health problematic in general see Harvard Project on American Indian Economic Development, *State of the Native Nations*, 219–225. President Obama referred to Native American health problems in his speech relating to the United States’ endorsement of UN-DRIP in December 2010: “We know that Native Americans die of illnesses like diabetes, pneumonia, flu—even tuberculosis—at far higher rates than the rest of the population,” <http://www.reuters.com/article/2010/12/16/us-obama-tribes-idUSTRE6BF4QJ20101216>.
123. On the relationship between a flourishing cultural sector and the socioeconomic development of the Māori peoples, see Lai, “Māori Culture in the Modern World,” 14–17.
124. The Bureau of Land Management, for example, with an agency budget of USD 1.3 billion in the 2010 fiscal year, reported a budget of USD 15.7 million for cultural resources for 2009. Only USD 69,286 was expended for NAGPRA compliance. U.S. GAO, *Report to Congressional Requesters*, 20.

125. U.S. GAO, *Report to Congressional Requesters*, 88–89.
126. 43 C.F.R. §10.8(f).
127. See the notice of intent published on 24 May 1996. The National Park Service announced in this notice the repatriation of 19 sacred Navajo objects from the Hubbell Trading Post National Historic Site to a lineal descendant of Ramon Hubbell. *Federal Register*, 24 May 1996, 61 (102), 26, 206. See also the notice of intent published on 14 July 1997. The Laboratory of Anthropology of the Museum of Indian Arts and Culture in Santa Fe announced in this notice the repatriation of a Chiricahua Apache Gahe mask of painted wood to the Mescalero Apache tribe. *Federal Register*, 14 July 1997, 62 (134), 37, 592.
128. Brown, “Culture, Property, and Peoplehood.” For defending responses, see Carpenter, Katyal, and Riley, “Clarifying Cultural Property”; Tsosie, “International Trade in Indigenous Cultural Heritage.”
129. UN Permanent Forum on Indigenous Issues, Online News, <http://www.un.org/esa/socdev/unpfii/en/news.html>.
130. See, for example, Daes, “The UN Declaration on the Rights of Indigenous Peoples,” 11–37.
131. The ILA was founded in Brussels in 1873. Its objectives under its Constitution are “the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law.” The ILA has consultative status, as an international nongovernmental organization, with a number of United Nations specialized agencies. See <http://www.ila-hq.org>.
132. ILA Committee of the Rights of Indigenous Peoples, *Draft Interim Report*, 43–52. For critical appraisal, see Kuprecht, “Human Rights Aspects of Indigenous Cultural Property Repatriation,” 220–222; Lai, “The Protection of Māori Cultural Heritage,” 19–23.
133. Humphrey and Verdery, “Introduction: Raising Questions about Property,” 12.
134. According to Daniel Fitzpatrick, in fragile states, restitution or redistribution programs do not work and are even detrimental. This is, however, particularly the case when land rights are affected. Fitzpatrick, “Possession, Custom and Social Order.”
135. NAGPRA, 25 U.S.C. § 3001(3).
136. NAGPRA, 25 U.S.C. § 3001(3).
137. *Cherokee Nation v State of Georgia* (1831) 30 U.S. 1 (Pet.), 17.
138. Goldberg, “American Indians and Preferential Treatment,” 943–955.
139. Goldberg, “American Indians and Preferential Treatment,” 950–955.
140. Coombe, “The Properties of Culture and the Politics of Possessing Identity,” 275.
141. See also Humphrey and Verdery, “Introduction: Raising Questions about Property,” 13–14.
142. Goldberg, “A United States Perspective.”
143. NAGPRA, 25 U.S.C. § 3001(4 and 8).
144. NAGPRA, 25 U.S.C. § 3010.
145. The Fifth Amendment protects private property from being taken for public use without just compensation. The Constitution of the United States, Amendment 5 (passed 25 September 1791, ratified 15 December 1791). For possible Fifth Amendment implications of NAGPRA, 25 U.S.C. § 3002 in cases of inadvertent discovery of NAGPRA on reservation fee lands, see Johnson and Haensly, “Fifth Amendment Takings Implications of NAGPRA.”
146. This was the outcome of a compilation of observations and proposals and a catalogue of the relevant provisions in national constitutions used by the Economic and Social Council to draft the Universal Declaration of Human Rights (van Banning, *Human Right to Property*, 137).
147. UN GA Res. 217A (III) (UN Doc. A/810) (adopted on 10 December 1948).
148. OAS Treaty Series No. 36; 1144 UNTS 123 (adopted on 22 November 1969, entered into force 18 July 1978); reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).
149. OAU Doc. CAB/LEG/67/3 rev. 5; 21 ILM 58 (adopted on 27 June 1981, entered into force 21 October 1986).
150. CETS No. 005 (adopted on 4 November 1950, entered into force 3 September 1953).
151. CETS No. 009 (adopted on 20 March 1952, entered into force 18 May 1954). For details, see van Banning, *Human Right to Property*, 57–79.



152. NAGPRA, 25 U.S.C. § 3002.
153. See Anton, *Rechtshandbuch Kulturgüterschutz und Kunstrestitutionsrecht*. The author compares native ownership to *in lege* state ownership in cultural property.
154. See section 3.2, “NAGPRA and Property Law.”
155. NAGPRA, 25 U.S.C. § 3002(a). See section 3.2, “NAGPRA and Property Law.”
156. NAGPRA, 18 U.S.C. § 1170(a).
157. NAGPRA, 18 U.S.C. § 1170(b).
158. McKeown and Hutt, “In the Smaller Scope of Conscience,” 207; and Iraola, “A Primer on the Criminal Penalty Provisions,” 435.
159. NAGPRA, 25 U.S.C. § 3002.
160. NAGPRA, 25 U.S.C. § 3005. McKeown and Hutt, “In the Smaller Scope of Conscience,” 208; and Iraola, “A Primer on the Criminal Penalty Provisions,” 435–437.
161. NAGPRA, 25 U.S.C. § 3001(3). Iraola, “A Primer on the Criminal Penalty Provisions,” 436; Trope and Echo-Hawk, “The Native American Graves Protection and Repatriation Act,” 73.
162. *U.S. v Kramer* (1999) 168 F 3d 1196 (C.A.10, N.M.).
163. *U.S. v Kramer* (1999) 168 F 3d 1196 (C.A.10, N.M.), 1201–1202.
164. NAGPRA, 25 U.S.C. § 3010; see *supra* section 4.3.1, “The Exclusion of Private Parties.”
165. Submitted to the General Assembly as a part of the Commission’s general report, Annex to General Assembly Res. 375 (IV) (6 December 1949).
166. General Assembly Res. 545 (VI) (5 February 1952); Res. 626 (VII) (21 December 1952); Res. 1314 (XIII) (12 December 1958); Res. 1515 (XV) (15 December 1960); Res. 1803 (XVII) (14 December 1962); and Res. 3281 (XXIX) (12 December 1974).

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